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No. 92-1039

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GREGG BOOKER,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

WHETHER A STATE APPELLATE COURT, IN REVIEWING THE SUFFICIENCY OF THE EVIDENCE SUPPORTING A CRIMINAL CONVICTION, MAY CONSIDER EVIDENCE PRESENTED AFTER THE STATE'S CASE IN CHIEF?

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CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No State shall...deprive any person of life, liberty, or property, without due process of law;..."

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STATUTORY PROVISION INVOLVED

Connecticut General Statutes 53a-55 (Rev. to 1989) provides, in pertinent part:

> "(a) A person is guilty of manslaughter in the first degree when ... (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

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SUPREME COURT RULES INVOLVED

Rule 10. Considerations Governing Review on Writ of Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

...

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

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OPINION BELOW

The opinion of the Connecticut Appellate Court is printed at 28 Conn. App. 34, 611 A.2d 878 (1992).

STATEMENT OF THE CASE

A. Procedural History

As the result of a shootout, the petitioner and two accomplices were charged with murder. After the commencement of the probable cause hearing, the state filed a substitute information charging the petitioner with manslaughter in the first degree. General Statutes § 53a-55(a)(3).

Thereafter, the petitioner was tried by jury on a four-count information charging him with conspiracy to sell narcotics; General Statutes §§ 21a-277, 53a-48; attempt to commit assault in the first degree; General Statutes §§ 53a-59(a)(1), 53a-49; and two counts of accessory to manslaughter in the first degree. General Statutes § 53a-54(a)(3). He was acquitted of the assault charge and convicted on the three other counts. Thereafter, the trial court, Hickey, J., sentenced him to an effective term of imprisonment of 30 years.

The petitioner appealed to the Connecticut Appellate Court [hereinafter "the Appellate Court"]. The Appellate Court rejected the petitioner's claims and affirmed the

judgment. *State v. Booker*, 28 Conn. App. 34, 611 A.2d 878 (1992). On July 10, 1992, the petitioner filed a petition for certification to the Connecticut Supreme Court, which was denied on September 17, 1992.

B. Facts Pertinent To The Petitioner's Claim

During the late spring of 1988, the petitioner and New Haven narcotics dealer Lamont Oliver conspired to sell heroin and cocaine at a Norwalk housing project. They charged one-half the price demanded by the local narcotics dealers. The latter conveyed their dissatisfaction to the petitioner and Oliver.

On the night of July 18, 1988, the petitioner, Oliver, and three other men traveled from New Haven to the Norwalk site. T. 12, 94. After arming themselves with firearms, they approached an open area between Building 13-14 and Building 19-20 and paused at the top of a stairwell. Between 30 and 100 people were gathered below in the parking lots and a courtyard.

Oliver said "Where are they?" or "Is that him?" and began to unwrap a rifle he carried concealed in a denim

jacket. A local narcotics dealer was standing across the parking lot. He said "Let's get out of here" to his companion and the two ran in front of Building 20. T. 212. The five gunmen then slowly descended the stairs while firing their guns across the parking lots and toward Buildings 19 and 20. Everyone in the area began to run away. Subsequently, when Oliver and his men began to flee, two men were seen firing back at them. The positions of those returning fire were described by witnesses and marked on diagrams of the scene.

One of the two victims, Everne Johnson, was sitting on a bench in front of Building 20 when the shooting began. She was struck by a bullet in the back and died soon thereafter. Her body was found near the bench.

A bullet fragment recovered during an autopsy performed on Johnson was a .22 high power center-fired cartridge projectile. The state's ballistics expert testified that the fragment was consistent with ammunition fired from a gun designed to fire .223 rounds. The expert witness further stated that this type of bullet is used in numerous long guns and rifles, but very few handguns. It could

have been fired from an M-16, a Chinese version of the AK-47, or an AR-15.

Witnesses described Oliver's assault rifle as a machine gun, an AK-47, or an M-16. Based on the description, a police officer believed it was an AR-15. The petitioner used a handgun, described by witnesses as either a .38 or a .357 semiautomatic. There was no description of the guns used by the three additional men accompanying Oliver or the two who fired back at them.

Lamont Oliver testified for the defense. He acknowledged that he had used an AK-47, but claimed that it used larger bullets than .22 caliber. He denied firing at building 20 or telling anyone he had.

In rebuttal, the state presented the testimony of a detective who had interviewed Oliver months earlier. The detective related that Oliver told him he was firing at some one who ran by Building 20 and that his gun used .223 caliber ammunition. Oliver acknowledged to the detective that it appeared his bullet killed Johnson.[1]

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[1] The detective's testimony was not objected to by the defense and the prosecution did not offer it only for its impeachment value.

The trial court instructed the jury that the petitioner could be found guilty as an accessory to manslaughter in the first degree if he or one of his associates caused the death of Everne Johnson.

C. The Petitioner's Claim On Appeal And Disposition Reached By The Appellate Court

On appeal, the petitioner claimed that the evidence was insufficient to allow the jury to find that Johnson's death was caused by him or one of his accomplices, as opposed to those who fired back at them. While defense counsel stated that the "focus" of his claim was the denial of his motion for judgment of acquittal at the end of the state's case in chief, he did not discuss or challenge the waiver rule.[2]

The state made no mention of the waiver doctrine in its brief. However, in addition to the evidence presented during the state's case in chief, it relied on evidence

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[2] Pursuant to the "waiver rule", appellate review of the sufficiency of the evidence encompasses any evidence presented by the defendant or in rebuttal, not just that presented during the state's case in chief. *See generally*, 2 Wright, *Federal Practice and Procedure* (West 1982) §463.

presented during rebuttal, that is, Oliver's admission that he shot Johnson.

In finding the evidence of causation sufficient, the Appellate Court stated and applied the waiver rule.

The petitioner challenged the validity of the waiver doctrine in his petition for certification to the Connecticut Supreme Court.

REASONS TO DENY THE PETITION

A. The Issue of the Waiver Rule's Validity Was Not Decided Below

No Connecticut court has ruled upon the constitutional validity of the waiver doctrine. Although the Appellate Court relied upon the waiver doctrine and recognized the criticism thereof, it made no analysis of its validity. It was not until after the Appellate Court affirmed his convictions that the petitioner challenged the validity of the waiver rule in his petition to the Connecticut Supreme Court. Since the Appellate Court decision did not address the validity of the waiver rule, the denial of certification by the Connecticut Supreme Court does not represent a decision on the merits of this question.

It is not the practice of this Court to review the judgments of state courts as to federal questions the state court has not had the opportunity to consider and decide. Justice Brennan, "State Court Decisions and the Supreme Court," 31 Penn. Bar Ass'n. Q. 393, 399-400 (1960). Accordingly, in the absence of a decision by the state's highest court squarely addressing the question presented, the validity of the waiver rule is not appropriate for certiorari. Rules of the Supreme Court, Rule 10.

B. No Federal Question Is Presented

The waiver doctrine is a rule of appellate procedure which is not of constitutional magnitude. It does not alter the state's burden of proving the accused guilty beyond a reasonable doubt, nor does it compel the defendant to present evidence or incriminate himself. The rule merely imposes a strategic decision on the defendant and requires him to accept the consequences of his choice.

The reasons for and against the rule are policy-based rather than constitutional in nature. For example, proponents of the rule point to the fact that it increases the accuracy of criminal trials: the evidence should not be

found insufficient where it is, in fact, sufficient. 2 Wright, Federal Practice and Procedure (West 1982) § 463. It is also stated that the waiver rule reflects commitment to the adversary system. *Id.* To the contrary, opponents of the doctrine argue that it compromises the right to have the state prove the defendant guilty before he may be put to proof and thereby creates an "appearance of unfairness". *State v. Simpson*, 64 Haw. 363, 641 P.2d 320, 325 (1982); *State v. Bachellor*, 89 N.J.L. 433, 98 A. 829, 830 (1916).

The resolution of such competing policy concerns is a task to be undertaken by local jurisdictions under the rule-making authority. Indeed, states which decline to apply the rule do so pursuant to local rules of court, not as a matter of constitutional law. *State v. Pennington*, 534 So. 2d 393 (Fla. 1988); *State v. Bachellor*, *supra*; *State v. Parks*, 56 Ohio App. 3d 8, 564 N.E.2d 747, 749 (1990), *citing Helmick v. Republic-Franklin Ins. Co.*, 39 Ohio St. 3d 71, 529 N.E. 2d 464 (1988); *Com. v. Cote*, 15 Mass. App. 229, 444 N.E. 2d 1282 (Mass. 1983); *State v. Adkins*, 786 S.W.2d 642 (Tenn. 1990).

In the absence of any constitutional question, the validity of the waiver rule in Connecticut courts is not a federal question.

C. The Petitioner Has Failed To Demonstrate That The Decision Below Is In Conflict With The Decision Of Another State Court, A Federal Court Of Appeal Or This Court

The petitioner has failed to show conflict among state and/or federal jurisdictions with respect to the waiver rule. Although, in the past, the waiver doctrine has been the subject of criticism and inconsistency among the Courts of Appeal; *see Maffei v. United States*, 406 U.S. 938 (1972) (Douglas J., dissenting); *Cephus v. United States*, 324 F.2d 893, 896-97 (D.C. Cir. 1963); Comment, "The Motion for Acquittal: A Neglected Safeguard," 70 Yale L.J. 1151 (1961); there is now a consensus among the twelve circuits as to the rule's validity and wisdom. *United States v. Chueng*, 836 F.2d 729, 730, n.1 (1st Cir. 1989); *United States v. Tyler*, 758 F.2d 66, 69 (2d Cir. 1985); *United States v. Wright-Barker*, 784 F.2d 161, 170 (3d Cir. 1986); *United States v. Heller*, 527 F.2d 1173 (4th Cir. 1975);

United States v. Whittington, 783 F.2d 1210, 1216 (5th Cir. 1986), *cert. denied*, 479 U.S. 882 (1986); *United States v. Black*, 525 F.2d 668, 669 (6th Cir. 1975); *United States v. Roman*, 728 F.2d 846, 858 (7th Cir. 1984); *United States v. Wetzel*, 514 F.2d 175, 177 (8th Cir.), *cert. denied*, 423 U.S. 844 (1975); *United States v. Patton*, 771 F.2d 1240, 1243 (9th Cir. 1985); *United States v. Walker*, 915 F.2d 1463, 1466 (10th Cir. 1990); *United States v. Correa-Tobon*, 748 F.2d 1509, 1511 (11th Cir. 1984); *United States v. Foster*, 783 F.2d 1082, 1083-85 (D.C. Cir. 1986).

It also appears that a majority of the state courts subscribe to the waiver rule. *See e.g. State v. Nunez*, 167 Ariz. 272, 806 P.2d 861, 868 (1991); *State v. Rutan*, 194 Conn. 438, 444, 479 A.2d 1209 (1984); *People v. Barrow*, 133 Ill. 2d 226, 139 Ill. Dec. 728, 549 N.E. 2d 240, 250 (1989); *Kuckel v. State*, 570 N.E. 2d 910, 915 (Ind. 1991); *State v. Smith*, 332 So. 2d 773 (La. 1976); *State v. Stringer*, 557 So. 2d 796, 797 (Miss. 1990); *State v. White*, 798 S.W. 2d 694, 696-97 (Mo. 1990); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607, 609 (Neb. 1991); *State v. Lane*, 328 N.C. 598, 403 S.E. 2d 267, 272 (1991), *cert. denied*, ___ U.S.

___, 112 S.Ct. 319 (1991); *State v. Schaeffer*, 450 N.W. 2d 754, 756 (N.D. 1990); *Com. v. Wallace*, 522 Pa. 297, 561 A.2d 719, 729 (1989); *State v. Henshaw*, 557 A.2d 1204, 1207 (R.I. 1989).

In the absence of a demonstrated conflict among the nation's appellate courts as to the waiver rule's constitutional validity, the issue is not worthy of certiorari review. Rules of the Supreme Court, Rule 10.

CONCLUSION

For the foregoing reasons, the State of Connecticut respectfully urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

STATE OF CONNECTICUT

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